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COURT OF CRIMINAL APPEALS
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NO. PD-0672-17

IN THE

NINTH COURT OF APPEALS

OF TEXAS

AT BEAUMONT, TEXAS

The State requests oral argument only if appellant argues

FILED
COURT OF CRIMINAL APPEALS
12/28/2017
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CRYSTAL BOYETT,
APPELLANT
V.
THE STATE OF TEXAS,
APPELLEE

BRIEF FOR THE STATE ON APPELLANT'S PDR

ON APPEAL FROM THE 356TH JUDICIAL DISTRICT COURT,
HARDIN COUNTY, TEXAS, CAUSE NUMBER 23010,
THE HONORABLE STEVE THOMAS, PRESIDING

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APPELLANT'S APPELLATE COUNSEL: James P. Spencer II

APPELLEE: The State of Texas, through the Hardin County District Attorney

APPELLEE'S TRIAL COUNSEL: District Attorney David Sheffield
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APPELLEE'S APPELLATE COUNSEL: District Attorney David A. Sheffield
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NO. PD-0672-17

CRYSTAL BOYETT,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellee, the State of Texas, respectfully submits this brief in reply to the brief of Appellant, Crystal Boyett, on her petition for discretionary review.

STATEMENT OF THE CASE

Appellant pleaded not guilty to Manslaughter after causing the death of Conley Burns and Courtney Sterling and seriously injuring their mother, Dawn Sterling, when she struck their vehicle with her own while driving at speeds over 100 miles per hour on February 3, 2014. The State proceeded to jury trial on April 20, 2015, on the manslaughter of Conley Burns, a twenty year old girl who was pregnant with her first child. The jury convicted appellant of the manslaughter of Conley, assessed her punishment at confinement for 20 years in the Texas Department of Criminal Justice, and also assessed a fine of $10,000 and entered a deadly weapon finding. (CR: 96). Appellant appealed this conviction and sentence, asserting three issues in the

Beaumont Court of Appeals. This Court granted review on a single issue, whether the Court of Appeals appropriately determined that the trial court did not abuse its discretion in finding that a formal competency hearing was unnecessary after defense counsel filed a mid-trial motion to find appellant incompetent to stand trial.

STATE'S COUNTERPOINT

THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT NO EVIDENCE BEFORE THE COURT WOULD SUPPORT A FINDING OF INCOMPETENCY AFTER THE COURT HAD MADE AN INFORMAL INQUIRY BASED UPON DEFENSE COUNSEL'S ASSERTIONS.

STATEMENT OF PERTINENT FACTS

Appellant did not contest sufficiency of the evidence to prove her guilt. The indictment as amended alleged that she committed manslaughter; in pertinent part, it alleged that on or about February 3, 2014, she did

> Then and there recklessly, to-wit: by driving a motor vehicle at an excessive speed, and/or by failing to keep a proper lookout for another vehicle, and or/by operating a motor vehicle at an unsafe speed, cause the death of an individual, Connely Burns, by driving said motor vehicle into and against another motor vehicle occupied by Connely Burns.

(CR: 44).

The State adduced evidence from multiple witnesses, including officers and civilians, (RR7: 24-185; RR8: 93-129), who testified to appellant driving at speeds of up to more than 150 miles per hour through two counties, over a distance of approximately 20 miles, dodging and veering wildly around other traffic until she

overtook and struck the vehicle in which the victim was riding near the location where Highway 69 crosses over Highway 96 in Hardin County, causing the death of the complainant in this case as well as the deaths of her unborn child and her sister, and serious injuries to her mother.

During trial, on the day before defense counsel supposedly noticed his client was incompetent, Lumberton Police officer Ryan Hargrove testified to his role in the investigation that night; he had followed appellant's red Camaro down the last stretch of road before the collision after she streaked by his patrol vehicle. Hargrove followed the emergency unit to the hospital when they transported appellant; she was conscious and consented to a blood draw. (RR8: 40-42). After he was advised by hospital personnel that Conely's sister Courtney was near death, he advised appellant that two people had been killed and a third seriously injured in the collision, and he read her Miranda rights to her before questioning her further. Appellant answered a few questions before telling him she did not want to talk anymore. She told him she had not been drinking, and that she took a Xanax pill about 12 hours before the collision. When he asked her why she was driving so fast, she told him she had "no general destination in mind and just wanted to drive fast." (RR8: 42-45). Hargrove testified that when he told appellant about two people being dead, she made no comment and appeared to have no remorse at all. (RR8: 43). She told him that in

addition to the Xanax she had taken that morning, she had taken prescribed Lithium for her bipolar disorder. (RR8: 76).

The ER nurse who assisted with appellant testified that she was alert and oriented that night and that when she was informed of the deaths of the people in the other vehicle, she had no apparent reaction and showed no remorse or distress. (RR8: 82-84). Ms. Youngblood testified that appellant did not have a flat affect such as she had seen in patients with a psychiatric disorder and that appellant took a nap after being questioned. (RR8: 86-90).

DPS Trooper Nathan Pierce, who was assigned to the "crash team" for this area, testified that he was called out to assist to the crash scene in Lumberton on February 3, 2014. Pierce identified photos of the scene that night, which were admitted. He explained that they sprayed orange paint on areas of pavement where there were significant features that might disappear quickly. (RR8: 132-45). He identified the diagram generated of the crash scene, State's exhibit 30. (RR8: 145-46). Pierce testified that investigators acquired the airbag control module, the "black box," from appellant's car; he explained that the Sterling's car had a module, but for that year model it did not retain data in a retrievable form. He explained how these boxes retain data about significant events, including collisions. Pierce took the box from appellant's car to Brian Henry at Lufkin Police Department to download the crash

data. He identified State's exhibit 33 as the data which printed. (RR8: 159-70).

Defense counsel questioned Pierce at length about math calculations which could be done using the data he collected to determine vehicle speeds and actions at the time of the collision. (RR8: 173-201). Pierce explained that with a rear-end collision, it is not possible to get an accurate computation unless the driver of the front vehicle or a passenger can give an estimate of the lead car's speed, which was not available in this case. (RR8: 201-02).

The last witness on the afternoon before appellant's supposed incompetence arose was William "Rusty" Haight, who next testified that he trains others in accident investigation and crash analysis and works with crash data retrieval (CDR) systems. He examined the CDR from appellant's car in this case, which showed that 2 1/2 seconds before this collision, appellant's car was traveling at 155 miles per hour. The readings fluctuated between 150 and 155 in the 2 1/2 seconds before impact. The accelerator and throttle readings showed that during that 2 1/2 seconds, the accelerator varied between 59 percent, 45 percent, and then 65 percent before the impact. The throttle readings were consistent with the accelerator and speed. (RR8: 217-20, 227-32). There was no brake application during that time. (RR8: 232).

On the next morning of trial, when the court convened proceedings and asked if everyone was ready to proceed, defense counsel responded that he was not ready

and had filed a motion, which he tendered to the court and prosecutor. (RR9: 6). The motion stated that "there is an issue in this cause regarding whether defendant is 'competent' to stand trial," but the unverified motion set out no facts in support and was not accompanied by any affidavits or other evidence. (CR: 80). Defense counsel represented to the court that after the conclusion of evidence the day before, he went with his "assistant" Jennifer Doornbos, his consulting crash expert Evans, appellant, her mother, and her sister to a conference room to discuss trial strategy. (RR9: 6-7). Counsel represented that when appellant left the room to go to the bathroom, he looked in the notebook he had given to her to write in during trial. He expected that she would write questions for him, but he found that she had doodled and drawn pictures during trial as well as keeping a diary-like note at the end. Defense counsel claimed that when he showed the notebook to appellant's mother and sister, her mother said she had seen appellant in the laundry room mumbling, talking, and laughing out loud the day before. (RR9: 7).

Defense counsel told the court that he had "consulted" with Doornbos, who "as I understand it, is just a couple of hours short of a Ph.D. in psychology." He claimed in unsupported argument that appellant had previously been diagnosed with "bipolar schizophrenia," and he had a "fervent belief" that she was "episodic." (RR9: 7-8). Defense counsel told the court that a local defense attorney told him in the cafeteria

that morning that appellant seemed "out of touch," and his crash test expert told him that he thought she was out of touch as well. (RR9: 8-9). Defense counsel claimed that he had intended to put appellant on to testify to "rebut some of the things the laypersons had said," but he did not think she could testify. (RR9: 10). Based upon defense counsel's concerns, the trial court agreed to conduct an inquiry under Chapter 46B. (RR9: 10). He excused the jury until after lunch, and permitted testimony on the issue. (RR9: 11).

Defense counsel called Jennifer Doornbos to support his motion. Doornbos testified that "I have seven degrees. I have been in practice for 17 years for Curt Wills as his psychological associate doing psychological testing, assessments, jury selection, and competency issues." She agreed that she had "shown up three days ago" to assist defense counsel in jury selection and decided to "stay on" for trial. (RR9: 14). Doornbos apparently did not have any particular relevant degree, license, or certification, and the record does not reflect her relationship to appellant. She testified that she observed appellant engage in 'extremely extraneous" behavior. Doornbos claimed that she knew "the history that she has hallucinations and delusions and she is schizophrenic and bipolar," and she became concerned about appellant's competence. Doornbos claimed that "in court cases, we will give a Defendant a notepad and paper which -- they can ask their attorneys, or the

prosecutors even, questions in trial." She claimed she was concerned when she saw that appellant was doodling during trial. (RR9: 15). Doornbos claimed that she had previously participated in court proceedings with defendants who wrote helpful notes during trial. (RR9: 15-16). Doornbos was also concerned because appellant wanted to go smoke instead of sitting in the room and conferencing with Doornbos and defense counsel. (RR9: 16). Doornbos claimed that appellant was "divorced from reality." (RR9: 17). Doornbos claimed that she was familiar with medications prescribed to appellant but could not say whether appellant was taking them. (RR9: 18-19).

On cross-examination, Doornbos admitted that appellant's mother was the one who suggested she might not come back from smoking. Doornbos explained that she thought appellant was abnormal because she made some little disgusted sounds during testimony. (RR9: 34-35). She believed appellant would have written productive notes in her notebook if she was competent. (RR9: 36). Doornbos saw notes appellant had written about what sentence she might get, which Doornbos thought were unrealistically optimistic. (RR9: 37-38). She opined that appellant unrealistically thought the jury liked her. (RR9: 38). Doornbos believed that "the competency goes to the fact as to whether or not she can adequately represent herself and assist Mr. Crocker in her defense." (RR9: 38-39). Doornbos *speculated* that

appellant was not taking her medications. (RR9: 39). She claimed she had seen some medical records from "Oceans," which she did not produce. (RR9: 39).

Doornbos admitted she did not know appellant before this trial, but she claimed that appellant's family told her appellant was not behaving normally. (RR9: 39-40). Doornbos admitted that she was not hired as a consultant or expert in the case but was "just up here" and decided to help the defense as a volunteer after the prosecutor rejected her offer of help. (RR9: 40-410. Doornbos explained that she thought appellant was detached after court on the previous afternoon because when they discussed Trooper Pierce's testimony, appellant didn't see "possibilities" for cross-examination. (RR9: 44). Doornbos attributed appellant's lack of interest to mental illness but could not say whether appellant "just didn't care." (RR9: 45).

James Evans testified that he was retained as a black box expert by defense counsel. When he talked to appellant, he felt that he wasn't get through to her. (RR9: 21-22). Evans testified that when he tried to explain his conclusions about the collision to appellant, she didn't seem to care but just dismissed him. (RR9: 50-51). He claimed he wasn't listening to what she said to her mother, but that they seemed to be more worried about whether they would be locked out of the building if they went out to smoke. (RR9: 52-53).

Appellant's sister Charlotte Bush testified that appellant did not want to talk

about the offense and got agitated and angry at having to be present; Bush claimed appellant "internalized" her anger. (RR9: 26). Bush claimed that appellant had prior diagnoses of "Bipolar and schizophrenia and depression." She claimed that appellant had current unspecified prescriptions for medications, but she did not know whether appellant was taking those medications. (RR9: 27-28). She found it unusual that appellant was "frequently cussing" when they were alone together. (RR9: 28). Bush claimed that appellant was hospitalized in 2013 for "bipolar schizophrenia." (RR9: 29).

On cross-examination, she admitted that appellant doesn't need help dressing and could drive herself around before she lost her license. She was working at the family "tax office." She was getting dressed every day and coming to trial, even though Bush claimed she was depressed. Bush had not talked to appellant's doctors about her treatment since 2013. Bush testified that appellant had been hospitalized in Louisiana for "almost two weeks" in 2013. (RR9: 54-60). There was no testimony that she was ever involuntarily committed or found to be incompetent.

Gary Butler, a local attorney, testified that he talked to defense counsel that morning in the courthouse cafeteria; Butler had seen appellant come in to get a cup of coffee, and he saw that she was talking to herself as she added sugar and creamer. (RR9: 30-31).

After a recess, the trial court found that the court had considered the testimony presented and found that there was not sufficient evidence to support a finding of incompetence. (RR9: 63). Defense counsel requested findings and conclusions, which the court agreed to provide, but none appear in the record. (RR9: 63).

After the State rested, defense counsel advised the court, outside the presence of the jury, that:

> Your Honor, the motion I'm going to make is in light of the filing of the suggestion of incompetency motion for mental exam, I anticipated calling my client to testify on her behalf. I feel that she is not competent to testify. Therefore, I cannot put her on the stand to testify. So, therefore, we cannot produce any witnesses at this point in time. So, we will rest, as well.

(RR9: 73-74). Counsel did not make an offer of proof about what appellant might have testified to, nor did he explain why he could not or did not call any other witnesses.

SUMMARY OF THE ARGUMENT

The State contends in response to appellant's issue that the trial court acted within its discretion in making an informal inquiry and determining that there was no credible evidence that would support a finding of incompetency after defense counsel suggested incompetency in the middle of trial, and the court of appeals therefore properly found no abuse of discretion.

STATE'S COUNTERPOINT, restated

THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT NO EVIDENCE BEFORE THE COURT WOULD SUPPORT A FINDING OF INCOMPETENCY AFTER THE COURT HAD MADE AN INFORMAL INQUIRY BASED UPON DEFENSE COUNSEL'S ASSERTIONS.

Appellant contended in the Court of Appeals that she suddenly became incompetent during trial and that the trial court erred in failing to stop the trial and obtain a medical or mental health expert to examine her. The State contended that the trial court acted within its discretion in conducting an informal inquiry, after which the court properly found that the defense had failed to present "some evidence" which would prove she was incompetent. Appellant filed this PDR in which he claims that the Court of Appeals applied an incorrect standard; the State contends that appellant is merely asking this Court to re-examine the evidence and reach a new conclusion that the inconsequential nuggets of testimony from various witnesses before the court amounted to at least "some" evidence simply because there were multiple witnesses and the State did not rebut their testimony.

Argument and authorities

"The legislative criteria for competency contemplate a defendant who is at least minimally able to interact with his trial counsel in a 'reasonable and rational' way (even if they do not necessarily agree) in formulating decisions how most effectively to pursue his defense." *Turner v. State*, 422 S.W.3d 676, 689-90 (Tex. Crim. App.

2013).

> Precisely because the defendant retains ultimate authority over [fundamental] decisions [including whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal], it is critical that he be able "to consult with counsel with a reasonable degree of rational understanding" about them. This is not to imply that a defendant's mental illness plus his failure to communicate with counsel will invariably or necessarily add up to a finding of incompetence. The fact that a defendant is mentally ill does not by itself mean he is incompetent. Nor does the simple fact that he obstinately refuses to cooperate with his trial counsel. Indeed, even a mentally ill defendant who resists cooperating with his counsel may nevertheless be found competent if the manifestations of his particular mental illness are not shown to be the engine of his obstinacy. [footnotes citations omitted]

Turner v. State, 422 S.W.3d at 691.

> a defendant's desire to have "his day in court and ... to tell his story his way," even when expressed with rambling speech, does not necessarily suggest incompetence. *Lawrence v. State,* 169 S.W.3d 319, 322–23 (Tex. App.–Fort Worth 2005, pet. ref'd); *see also Johnson v. State,* 429 S.W.3d 13, 18 (Tex. App.–Houston [14th Dist.] 2013, no pet.) ("Bizarre, obscene, or disruptive comments by a defendant during court proceedings do not necessarily constitute evidence supporting a finding of incompetency.").

Demarsh v. State, 2016 WL 1267702, at *5 (Tex. App. - Fort Worth Mar. 31, 2016, no pet. hist.)(not designated for publication).

In the instant case, no one associated with the defense team made any suggestion of incompetence until after the parties had sat through several days of trial (including particularly damning expert testimony the day before), it was apparent that appellant had no legitimate defensive theory to defend against a finding of guilt, and

the State was ready to present its last witness, the father of the two deceased young women. At that point, after the trial court had an opportunity to watch appellant's behavior in the courtroom all week and had presumably seen her interact with counsel and others, the defense team suddenly suggested to the court that appellant was incompetent because she was disinterested in the technical aspects of collision investigation, and because she did not write serious notes in a notebook which defense counsel had given her for her personal use (and which counsel chose to examine without appellant's consent while she was out of the room), which notebook was not offered as evidence in the hearing and does not appear in the record.

Defense counsel presented as his chief witness Ms. Doornbos, a volunteer assistant of unknown origin with "seven degrees" in unknown subjects (seven associate degrees in auto mechanics and air conditioning repair?) from unknown institutions and no known licenses or certifications, to render opinions based upon her previous employment as an assistant to some sort of psychologist or attorney. Ms. Doornbos claimed that she had reviewed mental health records relating to appellant, but defense counsel did not produce those records for the court's review, nor did the defense produce any other evidence of any mental health diagnosis. Ms. Doornbos, who testified as a lay witness, testified that she believed appellant to be incompetent because appellant had a rosier outlook than Doornbos believed was merited in light

of the evidence and because appellant thought the jury liked her. But Doornbos and the other witnesses admitted that appellant did realize she was on trial and that prison was a possible or likely eventuality.

The State contends that the trial court acted within its discretion in finding that there was not evidence before the court which would support a finding of incompetence and continuing the trial, and the court of appeals likewise appropriately deferred to the trial court's evaluation of the testimony before the court as well as the court's first-hand observations of appellant during the trial. Although defense counsel wanted a mental evaluation by a medical or mental health professional, appellant's refusal to participate in counsel's discussions would not form any basis for such a professional to find her incompetent should appellant have decided to adopt the same attitude with the expert. See Tex. Code Crim. Proc. article 46B.024(a-1) ("The expert's opinion on the defendant's competency or incompetency may not be based solely on the defendant's refusal to communicate during the examination.").

Similarly, appellant's previous alleged diagnosis of mental illness did not require the trial court to find that there was some evidence which would support a finding of incompetence, because mental illness alone is insufficient to prove incompetence. *See Turner v. State*, 422 S.W.3d at 691. In addition, the court could

take into account when determining the credibility of the suggestions of mental illness the fact that all of the information about mental illness seemed to originate with appellant's sister, who claimed she had not talked to appellant's doctors in two years and who admitted that appellant took care of her own needs, worked at a business, drove a car, and got up, dressed, and appeared at trial each day.

In sum, appellant's claim of incompetence was not supported by any credible testimony or facts before the court. Evidence that appellant was irritable, uninterested in talking to expert witnesses, bored by court proceedings, "cussed" in a room alone with her sister, made doodles in a notebook, expressed a strong interest in going outside to smoke a cigarette after court recessed for the day, and talked out loud to herself on one occasion in the cafeteria is no evidence of competence or incompetence; these are merely common, if unattractive, behaviors exhibited every day in courthouses everywhere. This trial court had before it no more compelling facts than the trial court did in *George v State*, where the defendant's "'bizarre disruptions,' 'physical shaking,' and 'outbursts,' before and during trial, as well as his failure to communicate with the trial court and counsel," did not require a formal competency hearing. *George v. State*, 446 S.W.3d 490, 499-501 (Tex. App. - Houston [1st Dist.] 2014, pet. ref'd) "If such actions were probative of incompetence, one could effectively avoid criminal justice through immature behavior." *George,* 446

S.W.3d at 501 (*citing Burks v. State,* 792 S.W.2d 835 (Tex. App. - Houston [1st Dist.] 1990, pet. ref'd). The fact that appellant did not react in the way her attorney and family felt she should react to the mounting pile of evidence against her and the horrific nature of the injuries she had inflicted on the victim and her family is not evidence of incompetence, particularly in light of the fact that it was consistent with the testimony of the officer and nurse regarding the night of the collision, when appellant exhibited a similar lack of guilt, concern, or remorse for what she had done. The court was certainly entitled to consider the testimony of the officer and of the nurse who cared for appellant that night, who testified that although appellant exhibited a callous disregard for her victims, she did not have a flattened or abnormal affect, but merely seemed callously unconcerned about her victims, (RR8: 82-90); this evidence would not have been improperly considered as evidence of "competency" but as context for appellant's reactions at the time of trial. Counsel and appellant's relatives claimed to know about prior mental illness treatment and claimed to have records relating to such illness, but they neither presented such records to the court nor explained how any previous diagnosis rendered her incompetent on the fourth day of trial after she had apparently been competent – in counsel and the family's opinions – when trial commenced. The trial court was in the best position to determine whether defense witness statements or argument had any

merit – were credible – or raised any colorable claim regarding her competence. The court properly denied appellant's motion for an expert examination and a trial on competence, and the Court of Appeals appropriately affirmed the trial court's determination on the issue.

Should this Court determine that the trial court should have appointed experts to examine appellant or should have afforded appellant a trial regarding competence, that the trial court erred not to do so, and that the Court of Appeals erred in affirming the conviction, the remedy is not reversal of the conviction, nor is it dismissal of the charges. Rather, the remedy is remand or abatement to the trial court for a retrospective competency hearing. *See Turner,* 422 S.W.3d at 696. The State submits that the trial court acted within its discretion in this matter, and in any event appellant's demand for a new trial or dismissal is without merit.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, there being legal and competent evidence sufficient to justify the verdict and no error appearing in the record of the trial of this case or in the opinion of the Court of Appeals, the State requests that this Honorable Court will affirm the judgments of the Court of Appeals and the Trial Court below.

Respectfully submitted,

/s/Sue Korioth
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief has been served on James P. Spencer II, Attorney for Appellant, by e-service, if available, or fax service.

/s/ Sue Korioth
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Rule 9.4 Certificate of Compliance

Using the Wordperfect X7 word count utility, I have determined that this document contains 4,057 words, not including matters excluded under TRAP 9.4(I).

/s/ Sue Korioth